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No. 03-1025

In The
Supreme Court of the United States

HALLIBURTON ENERGY SERVICES, INC.,

Petitioner,

v.

BJ SERVICES COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit applied the correct standard of review in affirming the judgment that U.S. Patent No. 6,017,855 (the '855 patent) is not invalid for indefiniteness, an issue voluntarily submitted to the jury by defendant-petitioner Halliburton, who raised no issue of claim construction in the district court or the Federal Circuit.

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STATEMENT

Inventors at BJ Services Company ("BJ Services") invented, and BJ Services patented, a dramatic improvement in a method of fracturing subterranean formations to enhance oil and gas production, using greatly reduced concentrations of polymers in the fracturing fluids. Fed. Cir. Appendix A130-35 (the '855 patent). BJ Services sued Halliburton for infringement and discovered that Halliburton's own documents specifically stated that it had copied BJ Services' new method. *Id.* at A5287, A5289.

Halliburton raised a host of defenses, including the defense that the '855 patent was invalid under 35 U.S.C. § 112, ¶ 2, because its claim language was indefinite. The validity challenges were rejected and Halliburton was found to infringe. Additional facts are set forth in the Federal Circuit's opinion. Pet. App. 2a-7a.

The indefiniteness challenge is the subject of Halliburton's petition to this Court. Claim 17 of the '855 patent requires the polymer used in the fracturing fluid to have a "C* value of about 0.06% by weight." Pet. App. 2a. Halliburton argues before this Court that the term "C*" renders claim 17 indefinite because the patent fails to disclose the methods and conditions for determining C*, thus allegedly leaving skilled readers of the patent irretrievably uncertain whether fracturing methods would fall inside or outside the patent. Pet. 3-5 & 6, n.3.

BJ Services showed at trial that there are only two methods of determining C*, not "multiple methods."[1] *See* Pet. App. 5a; Fed. Cir. Appendix A7743; Pet. 4. Experts for both Halliburton and BJ Services used the more rigorous experimental method to determine C*. *See* Fed. Cir. Appendix A7743, A9010-11, A9029. In addition to the experimental method, persons skilled in the art may also use a "theoretical" method to determine C*. *Id.* at A7743. There is only one such theoretical method: $C^* = K/[\eta]$. Even Halliburton's expert testified that the constant, K, is *unique to each polymer and the solution in which it is dissolved*, and is typically determined by the experimental method. *Id.* at A9104-05, A9223-25. Accordingly, Halliburton's arguments that there are "at least seven variants of the 'theoretical' method" and that "the C* value of a polymer could vary by as much as five times" (Pet. 4) are disingenuous: the literature simply reports seven different constants for seven *different* polymers. *Id.* Moreover, the trial evidence established that, when the theoretical method is properly applied, it produces the same C* as the experimental method.[2] *See* Fed. Cir. Appendix A4182, A7565-66; Pet. 4-5.

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[1] Contrary to Halliburton's suggestion (Pet. 4), the fact that persons skilled in the art may need to consult the scientific literature to determine how to measure C* does not render the '855 patent invalid. *See Atmel Corp. v. Information Storage Devices, Inc.*, 198 F.3d 1374, 1382 (Fed. Cir. 1999); Pet. App. 5a.

[2] *See, e.g., PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1563 (Fed. Cir. 1996) (holding patent not invalid because, although the inventors failed to specify a particular method, "all of the conventional methods . . . produce essentially identical results").

At trial, Halliburton did not contest the district court's *construction* of "C*," as given to the jury for the performance of its various tasks in ruling on validity and infringement issues. Nor did Halliburton contest that construction in seeking review in the Federal Circuit. Moreover, Halliburton itself proposed that the indefiniteness challenge would go to the jury, and the jury instruction used was precisely the one Halliburton proposed, asking the jury to determine whether, under the construction of C*, "a person of ordinary skill in the art would understand what is and what is not covered." Fed. Cir. Appendix A55. The jury found that claim 17, as construed, was not indefinite. Pet. App. 19a.

The Federal Circuit affirmed the district court's judgment in accordance with the jury's verdict. Pet. App. 9a-10a. The court expressly stated that the indefiniteness issue is a legal determination and then noted that, where the particular indefiniteness challenge turns on underlying factual issues, they are "amenable to resolution by jury," as Halliburton appreciated by submitting the issue in this particular case to the jury. Pet. App. 5a; Fed. Cir. Appendix A55. In affirming the judgment here, the court noted that Halliburton "did not call its expert who was supposed to testify about the measurement conditions one of skill in the art would employ." Pet. App. 5a-6a.[3] The panel was unanimous.

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[3] Halliburton made essentially the same argument regarding "C*" – alleged lack of sufficient detail about measurement methods – under the guise of enablement (35 U.S.C. § 112, ¶ 1) and indefiniteness (35 U.S.C. § 112, ¶ 2). The Federal Circuit's explanation, though

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Halliburton sought rehearing *en banc* on the ground that the standard of review applied by the panel conflicted with that of other Federal Circuit indefiniteness precedents, the same issue presented by Halliburton to this Court. The petition garnered not a single recorded vote for rehearing (Pet. App. 25a) in a court whose judges have not been at all reluctant to take cases *en banc* or to register separate views about intra-circuit conflicts.[4] Evidently, the Federal Circuit judges do not perceive that this case presents a conflict.

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mentioning only the first, fully disposes of Halliburton's single common argument and thus applies equally to both.

[4] *See, e.g., Elan Pharmaceuticals, Inc. v. Mayo Found.*, 346 F.3d 1051 (Fed. Cir. 2003) (*en banc* decision); *Johnson & Johnston Assocs., Inc. v. R.E. Service Co.*, 285 F.3d 1046 (Fed. Cir. 2002) (*en banc* decision); *see also, e.g., Schering Corp. v. Geneva Pharmaceuticals, Inc.*, 348 F.3d 992 (Fed. Cir. 2003) (petitions for panel rehearing and rehearing *en banc* denied; two separate dissenting opinions from denial of *en banc* hearing, and one recorded vote without opinion to rehear appeal *en banc*); *Litton Sys., Inc. v. Honeywell, Inc.*, 145 F.3d 1472 (Fed. Cir. 1998) (petitions for panel rehearing and rehearing *en banc* denied; three separate dissenting opinions from denial of *en banc* hearing); *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094 (Fed. Cir. 2001) (petitions for panel rehearing and rehearing *en banc* denied; one recorded vote for rehearing *en banc*); *Nilssen v. Motorola, Inc.*, 203 F.3d 782 (Fed. Cir. 2000) (petitions for panel rehearing and rehearing *en banc* denied; one recorded vote for rehearing *en banc*).

REASONS FOR DENYING THE WRIT

I. This Case Presents No Claim Construction Issue and The Federal Circuit's Decision Does Not Conflict With This Court's Holding in *Markman v. Westview Instruments* or the Federal Circuit's Holding in *Cybor Corp. v. FAS Techs., Inc.*

This case does not present any fundamental question in patent law concerning the role of the courts in interpreting patent claims. The jury did not construe the claims of the '855 patent, and the Federal Circuit did not "defer" to the jury on a "matter[] of patent claim interpretation." Pet. 2. Halliburton's assertion that the Federal Circuit's decision here conflicts with this Court's claim construction decision in *Markman* is unfounded because there was no claim construction issue presented in this case for review by the Federal Circuit.

A. Halliburton Waived Any Claim Construction Challenge.

The district court in this case conducted a claim construction hearing pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), and issued an order construing certain claim terms of the '855 patent, including "C*" and "about 0.06% by weight" – the terms Halliburton argued render claim 17 indefinite. Pet. App. 16a-17a. Halliburton never objected to or preserved any error regarding the district court's construction of these terms.[5]

[5] During trial, well after the *Markman* hearing, the district court also construed the term "aqueous fluid," and Halliburton subsequently objected to the court's construction of this term and related jury

(Continued on following page)

Nor did Halliburton dispute that claim 17 was capable of construction. *See* Fed. Cir. Appendix A52, A6004-05, A6017, A9625-28. The jury was subsequently instructed on the meaning of the claim terms in accordance with the district court's construction. *Id.* at A52. As in the district court, Halliburton raised no claim interpretation issue on appeal to the Federal Circuit. *See* Pet. App. 1a-9a. Halliburton has thus waived any claim construction challenge and cannot raise one in this Court now. *Ballard Med. Prods. v. Allegiance Healthcare Corp.*, 268 F.3d 1352, 1363 (Fed. Cir. 2001).

B. Even Without Halliburton's Waiver, There is No Claim Construction Issue or Conflicting Decision in This Case.

Halliburton mischaracterizes the indefiniteness issue in this case as a claim construction issue. The indefiniteness inquiry is distinct from that of claim interpretation where, as here, a claim is capable of construction. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 986 (Fed. Cir. 1995) ("Ambiguity, undue breadth, vagueness, and triviality are matters that go to claim *validity* for failure to comply with 35 U.S.C. § 112 – ¶2, not to interpretation or construction." (quoting *Intervet Am., Inc. v. Kee-Vet Labs., Inc.*, 887 F.2d 1050, 1053 (Fed. Cir. 1989) (emphasis original))), *aff'd*, 517 U.S. 370 (1996); *see also* Pet. App. 5a. The issue at trial and before the Federal Circuit was not one of claim interpretation, as Halliburton now asserts, but

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instruction. Fed. Cir. Appendix A9625, A9450-52. Halliburton did not raise this issue in its post-trial motions or on appeal.

the indefiniteness inquiry of whether a person skilled in the art, taking the claim construction as accepted by Halliburton, would know the limits of claim 17 of the '855 patent. *See* Pet. App. 5a; Fed. Cir. Appendix A55; *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986). Accordingly, the two seminal claim interpretation decisions primarily relied upon by Halliburton to argue a conflict with this case – *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) and *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) – are irrelevant and present no conflict.

II. The Federal Circuit Applied the Correct Standard of Review in Accordance with its Precedents, and its Decision Created No Inconsistency or Unpredictability in Patent Law.

A. The Federal Circuit Applied the Correct Standard of Review.

Applying its established precedents, the Federal Circuit reviewed the ultimate conclusion of indefiniteness *de novo* and the underlying facts for substantial evidence in this case (where the challenger voluntarily submitted the issue to the jury for its factual resolution). Pet. App. 5a. Thus, although Halliburton suggests a conflict with the decisions in *Honeywell Int'l, Inc. v. Int'l Trade Comm'n*, 341 F.3d 1332, 1339-40 (Fed Cir. 2003) and *Exxon Research & Eng'g Co. v. United States*, 265 F.3d 1371, 1376 (Fed. Cir. 2001) over the legal nature of indefiniteness, the Federal Circuit in this case expressly agreed that indefiniteness is a question of law. The Federal Circuit stated:

> Indefiniteness is also a legal determination arising out of the court's performance of its duty construing the claims, *Personalized Media Communications*,

> 161 F.3d at 705, and is reviewed *de novo*. *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 296 F.3d 1106, 1113 (Fed. Cir. 2002).

Pet. App. 5a.

The court was on just as solid ground in reviewing certain underlying (here dispositive) facts for substantial evidence in this case. With no dispute about whether the claims were capable of being construed, or about their construction,[6] Halliburton requested that the question of indefiniteness be submitted to the jury, and the district court charged the jury using Halliburton's proposed instruction. Fed. Cir. Appendix A55. In its jury instruction, Halliburton acknowledged that the indefiniteness question in this case depended on underlying fact issues – whether skilled persons, using the undisputed construction, would be able reasonably to determine whether they were within the claims.[7] *See id.*; *Intellectual Property Dev't, Inc. v. UA-Columbia Cablevision of Westchester, Inc.*, 336 F.3d 1308, 1320 n.10 (Fed. Cir. 2003) (citing *Exxon* and *Atmel*); *Intel Corp. v. VIA Techs., Inc.*, 319 F.3d 1357, 1366 (Fed. Cir. 2003) (acknowledging that indefiniteness includes underlying facts). In contrast to the questions of whether a claim has a meaning and what that meaning is, nothing in *Markman* or other decisions of this Court suggests that

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[6] *See* n.5, *supra*.

[7] Further acknowledging the disputed fact issues underlying the indefiniteness conclusion in this case, Halliburton argued in its post-trial motions that "[i]n light of the evidence at trial, no reasonable jury could have found that the '855 patent satisfied the definiteness . . . requirement[ ]" and that the jury's findings regarding indefiniteness were "against the weight of the evidence." Fed. Cir. Appendix A673-74.

other factual questions cannot be submitted for resolution by a trier of fact and reviewed accordingly.

B. The Federal Circuit's Decision in This Case Consistently Applies Federal Circuit Jurisprudence.

In this case, claim 17 was indisputably capable of being construed, and Halliburton submitted the remaining factual question – whether skilled persons would understand the claim as construed by the district court – to the jury. Fed. Cir. Appendix A55. In this circumstance, the Federal Circuit's treatment of that aspect of the issue as reviewable for substantial evidence not only is correct, but presents no conflict with prior Federal Circuit precedents. *See Beachcombers Int'l, Inc. v. Wildewood Creative Prods., Inc.*, 31 F.3d 1154, 1158 (Fed. Cir. 1994) (reviewing jury's findings supporting the conclusion of indefiniteness for substantial evidence).[8] The Federal Circuit's decision in this case simply does not create a "confused and unpredictable state of the law." Pet. 14.

The decisions Halliburton relies on to suggest a split in Federal Circuit authority (Pet. 9-10) are inapposite. Whereas it was undisputed that the claim term here *is* capable of construction, the cited decisions involve claims that were inherently incapable of construction. Where the court "determines that a claim is not 'amenable to construction,' then

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[8] *See also F.B. Leopold Co. v. Roberts Filter Mfg. Co.*, Nos. 96-1218, 96-1278, 96-1456, 96-1471, 1997 WL 378004, at *1 (Fed. Cir. Jul. 2, 1997) (applying substantial evidence standard to jury's underlying fact findings regarding indefiniteness) (unpublished opinion).

the claim is invalid as indefinite under 35 U.S.C. § 112, ¶2." *Honeywell*, 341 F.3d at 1338 (citing *Exxon*). In such a situation, indefiniteness is determined directly as a matter of claim construction analysis.

In *Honeywell*, for example, a case arising on summary judgment in the International Trade Commission, the indefiniteness question was presented entirely as a matter of claim construction analysis, and the court held that the claims were "insolubly ambiguous" and therefore incapable of construction. 341 F.3d at 1340. Indeed, the court in *Honeywell* pointedly noted that there were no disputed facts at issue. *Id.* at 1336, 1339. Contrary to Halliburton's argument (Pet. 13), *Honeywell* does not have "nearly identical facts." In *Honeywell*, it was *undisputed* that there were four different methods for making a required measurement and *each produced a different result* so that the "choice of sample preparation method is critical to discerning whether a particular product is made by a process that infringes the '976 patent claims." *Id.* at 1339. In the present case, by contrast, both the experimental and theoretical methods correctly determine C* when properly applied. Fed. Cir. Appendix A4182, A7565-66.

Halliburton's reliance on *Exxon* to find a conflict also is misplaced. Pet. 11-12, 14-15. The decision in *Exxon*, which reversed a summary judgment of indefiniteness, does not mandate *de novo* review of the factual issues underlying the indefiniteness question in this case. The indefiniteness issue presented in *Exxon* was whether the claims were capable of construction, and the court concluded they were, applying traditional claim construction principles. 265 F.3d at 1375; 1377-84.

Similarly, in the *Cardiac Pacemakers*, *Atmel*, and *Baker Hughes*[9] decisions relied upon by Halliburton, the Federal Circuit found that the indefiniteness inquiry was "inextricably intertwined with claim construction" because the claims were incapable of construction.[10] *See, e.g.*, *Atmel*, 198 F.3d at 1378, 1379 ("[I]n the § 112, ¶ 6 context, a court's determination of the structure that corresponds to a particular means-plus-function limitation is indeed a matter of claim construction."); Pet. 10. As a result, the Federal Circuit's review "'without deference' to the findings in the trial court" in these cases (Pet. 9) does not conflict with the standard of review applied here.

C. The Federal Circuit's Decision Creates No Unpredictability in Patent Law.

With no intra-circuit conflict on indefiniteness review, Halliburton's concern about the jury's role in determining indefiniteness (Pet. 20) is unfounded. As Halliburton appreciated, it is well established that, on other invalidity issues – such as obviousness, non-enablement, and inventorship – the ultimate issue is one of law, but juries can

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[9] *Baker Hughes, Inc. v. Davis-Lynch, Inc.*, No. 01-1377, 2002 WL 410485 (Fed. Cir. March 15, 2002).

[10] These cases address the interpretation of means-plus-function claim limitations (*see* 35 U.S.C. § 112, ¶ 6), which by the express terms of the statute are *construed* to reach a corresponding structure set out in the specification, plus equivalents of that structure. In the cited cases, there was no corresponding structure in the specification, and so the claims were incapable of being construed. *See Cardiac Pacemakers*, 296 F.3d at 1116; *Atmel*, 198 F.3d at 1378-79; *Baker Hughes*, 2002 WL 410485, at *3-4. Claim 17 in this case is not a means-plus-function claim.

and routinely do determine underlying facts.[11] *See, e.g., Hewlett-Packard Co. v. Mustek Sys., Inc.*, 340 F.3d 1314, 1325 (Fed. Cir. 2003) (obviousness); *Allen Organ Co. v. Kimball Int'l, Inc.*, 839 F.2d 1556, 1566 (Fed. Cir. 1988) (non-enablement); *Hess v. Advanced Cardiovascular Sys., Inc.*, 106 F.3d 976, 980 (Fed. Cir. 1997) (inventorship). The determination in this particular case – that skilled persons would understand how to determine whether their methods were within the C* limits – is a classic example of such an issue. This is especially so here, where Halliburton chose not to put on its expert to testify about this key issue and the jury was charged with the precise indefiniteness instruction requested by Halliburton. By incorrectly asserting a conflict with established precedents, it is Halliburton that is seeking to upset settled practice in now urging that courts, not juries, must determine subsidiary factual questions (with *de novo* review) where the ultimate issue is a legal one.

[11] This well-established practice provides all the "interjurisdictional uniformity" (Pet. 17) needed on invalidity matters in the patent system. A holding that a patent is *in*valid has preclusive effect against the patentee in other cases, absent extenuating circumstances, *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 349-50 (1970), and as a practical matter fully litigated determinations of *validity* rarely get re-litigated. And invalidity matters are different from deciding *what* the claim means: the claim construction is used for all infringement and invalidity issues that arise in litigation involving that patent.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 4, 2004

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